

**EXHIBIT A-1**

**12/30/16 Grace Superior Court Reply**

Rosemarie S. Lewis, Esq. SBN: 158891  
 Jeffrey Z. Liu, Esq. SBN: 276849  
 BORTON PETRINI, LLP  
 626 Wilshire Boulevard, Suite 975  
 Los Angeles, California 90017  
 Tel: (213) 624-2869  
 Fax: (213) 489-3930  
 mtrostler@bortonpetrini.com  
 Attorneys for Cross-Defendants  
 W.R. GRACE & COMPANY and Grace Davison

**FILED**  
 Superior Court of California  
 County of Los Angeles

DEC 30 2016

Sherri A. Carter, Executive Officer/Clerk  
 by Raul Sanchez Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 COUNTY OF LOS ANGELES, CENTRAL JUDICIAL DISTRICT

TIG INSURANCE COMPANY,  
 A California corporation,

Plaintiff,

v.

GARY SMOLKER, an individual, and ALICE  
 SMOLKER, an individual; and DOES 1-10,  
 inclusive,

Defendants.

Case No. BC173952

*Transferred to the Honorable Judge Richard Fruin  
 Department 15*

**W.R. GRACE & COMPANY AND GRACE  
 DAVISON'S SUPPLEMENTAL BRIEFING  
 TO MOTION TO DISMISS FOR FAILURE  
 TO BRING ACTION TO TRIAL WITHIN  
 FIVE YEARS AS REQUIRED BY CODE OF  
 CIVIL PROCEDURE §583.310, §583.360;  
 DECLARATION OF ROGER J. HIGGINS,  
 ESQ. IN SUPPORT THEREOF;  
 DECLARATION OF JEFFREY Z. LIU, ESQ.  
 AND ROGER HIGGINS, ESQ. IN SUPPORT  
 THEREOF; REQUEST FOR MONETARY  
 SANCTIONS IN THE AMOUNT OF \$4896.00  
 AGAINST GARY SMOLKER AND/OR THE  
 LAW OFFICES OF GARY S. SMOLKER**

GARY SMOLKER,

Cross-Complainant,

v

HOME SAVINGS TERMITE CONTROL, INC., et  
 al.,

Cross-Defendants

RESERVATION NO.: 161115174315

Date: January 17, 2017  
 Time: 8:30 A.M.  
 Place: Department 15

## I. INTRODUCTION

Cross-Complainant GARY SMOLKER's ("Smolker") has made misrepresentations to this Court in his futile and ill-conceived oppositions to W.R. GRACE & COMPANY and Grace Davison's ("Grace") motion to dismiss ("Motion"). Despite his representations to this Court in both his written opposition and during oral argument (on December 20, 2016) against the granting of this Motion by stating that he had been caught unaware and was surprised by the lifting of Grace's bankruptcy stay, the evidence provided in this supplemental briefing clearly shows that Smolker was not only privy to the lifting of the bankruptcy stay, but had in fact been properly served with all pertinent documents from the bankruptcy court. Furthermore, the exhibits to this supplemental brief shall establish that Smolker had interacted with Grace's bankruptcy counsel on several occasions to discuss the stay both prior to, and after the relevant bankruptcy orders were issued and served upon all parties.

Finally, Smolker's eleventh hour contentions during oral argument regarding the existence of statutory authority that would allegedly obligate Grace to provide notice to this Court regarding the lifting of the stay are nothing more than mere puffery. Smolker's fruitless arguments shine a revealing light on his shameless efforts to confound the Court's, waste resources and time, and to delay the inevitable dismissal of this action. Grace's motion to dismiss should be granted and, as will be set forth more specifically below, and in the declaration of Jeffrey Z. Liu, Esq., monetary sanctions in the amount of \$4896.00 should be imposed on Smolker for his actions.

## II. SUPPLEMENTAL FACTUAL AND PROCEDURAL BACKGROUND

On April 2, 2001, Grace filed for Ch. 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware, which imposed an automatic stay of proceedings in this litigation. On August 27, 2001, Smolker filed a claim in connection with Grace's bankruptcy assessing property damage to his condominium relating to termite extermination. Declaration of Roger J. Higgins, Esq. ("Higgins Decl.") at ¶2. This claim was based solely on Smolker's claims in this litigation. On January 30, 2015, Grace filed its Claim Objection, which was served by first class mail to Mr. Smolker at his current address. *Id.* A certificate of service regarding the claim objection was subsequently filed with the bankruptcy court. *See* Ex. C to Higgins Decl. On February 3, 2015, an amended notice of the claim

1 Objection was served by first class mail to Smolker at his current address. Higgins Decl. at ¶2, *see also*  
 2 Ex. D. to Higgins Decl.

3 On February 22, 2015, Smolker faxed a response to the Claim Objection to various  
 4 counsel for Grace. Higgins Decl. at ¶3, *see also* Ex. E. to Higgins Decl. This demonstrates that  
 5 Smolker's address was service was accurate and that Smolker did receive and review the Claim  
 6 Objection from Grace's bankruptcy counsel. Smolker followed this correspondence with a second faxed  
 7 response on February 25, 2015. *Id.*, *see also* Ex. F to Higgins Decl.

8 On March 3, 2015, Smolker contacted Roger Higgins ("Higgins"), Grace's bankruptcy  
 9 counsel, by phone to discuss the hearing on the Claim Objection scheduled for March 4, 2015. Higgins  
 10 Decl. at ¶4. Smolker and Higgins discussed the substance of the Claim Objection and the form of the  
 11 order to the Claim Objection to be submitted to the judge. Later that morning, Higgins sent Smolker an  
 12 e-mail correspondence containing the form of the order with the modifications that had been discussed  
 13 in their earlier phone correspondence. Higgins Decl. at ¶4, *see also* Ex. H to Higgins Decl. Smolker  
 14 responded to this e-mail and acknowledged receipt of the proposed order, memorialized the topics of  
 15 this phone conversation with Higgins in an e-mail sent later that day and indicated that he had "no  
 16 objection to the Bankruptcy Court lifting the injunction which stayed prosecution of the State Court  
 17 action: TIG Insurance Co. v. Gary Smolker, et al. Case No. BC 173952 in Los Angeles Superior Court."  
 18 Ex. G. to Higgins Decl.

19 On March 4, 2015, the bankruptcy court entered its order lifting the injunction on this  
 20 matter. *See* Higgins Decl., Ex. I. On the same date, a copy of this order lifting the injunction was  
 21 served by first class mail to Smolker at his current address. *See* Higgins Decl., Ex. J. The caption on the  
 22 affidavit of service indicates that the document that was served was the:

23  
 24 [Signed] Thirty-Seventh Omnibus Objection to Certain Claims Filed Regarding  
 25 Prepetition Litigation Captioned, TIG Insurance Company v. Gary Smolker, et al., Case  
 26 No. BC173952 (Los Angeles County Sup. Ct.) (Janavs, J.)  
 27 (Substantive Objection).

28 The docket for the bankruptcy court clarifies that the affidavit of service was for document 32518,

which is the Order lifting the injunction on the instant litigation. *See* Higgins Decl., Ex. B at 10 (at entry no. 32518 and 32522). As such, Smolker was in receipt of the final order from the bankruptcy court notifying him that the injunction on the instant litigation was lifted.

### III. SUPPLEMENTAL ARGUMENT

#### A. Smolker's Misrepresentations To The Court

During the December 20, 2016 hearing, Smolker made it a point to communicate to the court that Grace had lain in wait to "ambush [him]" with the information that the injunction on the litigation imposed by the bankruptcy court had been lifted. *See* Declaration of Jeffrey Liu ("Liu Decl."), Ex. 1 (Rough Transcript of December 20, 2016 hearing) at 12:9-16. However, as clearly demonstrated above, not only did Smolker receive notice and proper service of the order lifting the injunction but that he also had communicated with Grace's bankruptcy counsel Roger Higgins, Esq., via phone, fax, and e-mail the day before the bankruptcy court's order was filed.

Furthermore, Smolker was provided the proposed order to lift the injunction by Mr. Higgins via e-mail before it was submitted to the bankruptcy court. Higgins Decl. at ¶4, *see also* Ex. H to Higgins Decl. In fact, Smolker responded to Mr. Higgins' e-mail, acknowledged receipt of the proposed order, memorialized the topics of this phone conversation with Higgins in an e-mail sent later that day and indicated that he had "no objection to the Bankruptcy Court lifting the injunction which stayed prosecution of the State Court action: *TIG Insurance Co. v. Gary Smolker, et al.* Case No. BC 173952 in Los Angeles Superior Court" Ex. G. to Higgins Decl. This is a complete contradiction to the claims raised by Smolker during the December 20, 2016 hearing on this motion. He wasn't ambushed regarding the lifting of the stay, he was fully and repeatedly informed of everything that was occurring with the bankruptcy court in relation to his claims for at least a day prior to the order being filed by the bankruptcy court. Smolker even provided input as to modifications to the draft order that was ultimately adopted by the bankruptcy court on March 4, 2015.

#### B. Delaware Bankruptcy Court Service Requirements

On March 4, 2015, the Court entered its *Order Lifting Injunction in Prepetition Litigation Captioned, TIG Insurance Company v. Gary Smolker, et al., Case No. BC 173952 (Los Angeles County*

Sup. Ct.) (*Janavs, J.*) (*Substantive Objection*) [Docket no. 32518]. ("Lift Injunction Order") See Higgins Decl., Ex. I. This order was substantially identical to the form of order sent to Mr. Smolker on March 3, 2015, via e-mail correspondence.

Regarding the service of orders entered by bankruptcy judges, Fed. R. Bankr. P. 9022 provides in relevant part:

**Judgment or order of bankruptcy judge.** Immediately on the entry of a judgment or order the clerk shall serve a notice of entry in the manner provided in Rule 5(b) Fed. R. Civ. P. on the contesting parties and on other entities as the court directs ... Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.

Del. Bankr. L.R. 9022-1<sup>1</sup> provides:

**Service of Judgment or Order.** Immediately upon the entry of a judgment or order, the Clerk shall serve a notice of the entry of the judgment or order on Delaware Counsel for the movant, via electronic means, as consented to by the movant. Registered CM/ECF users are deemed to have consented to service of the notice of the entry of orders or judgments via electronic means. If counsel for the movant is not a registered CM/ECF user, the Clerk shall serve a copy of the judgment or order on Delaware Counsel for the movant via first class mail. Counsel for the movant shall serve a copy of the judgment or order on all parties that contested the relief requested in the order and on other parties as the Court may direct and file a certificate of service to that effect within forty-eight (48) hours. For any pro se movant or sua sponte order, the Clerk's Office shall serve a copy of the judgment or order via first class mail on all parties affected thereby and file a certificate of service to that effect, unless otherwise directed by the Court.

Furthermore only one copy of an order need be served on a party:

**Service Copies.** Unless otherwise ordered by the Court, only one (1) copy of pleadings, motions and other papers need be served upon another party.

Del. Bankr. L.R. 9013-3.

<sup>1</sup> By function of Del. Bankr. L.R. 2001-1(f) & (g) and normal practice before bankruptcy courts in the District of Delaware, claims agents retained in large chapter 11 cases (with more than 200 creditors) perform the noticing function normally performed by the clerk of the court as to claims objections, including but not limited to the service of orders entered by bankruptcy judges. In the normal course of practice in large chapter 11 cases, debtors' counsel work hand-in-hand to provide service of documents, including orders, thereby relieving the Clerk's Office of that function.

On March 4, 2015, counsel for Grace served by first class mail a copy of the Lift Injunction Order on Smolker at the address set forth above, as well as on the other claimants and on the United States Trustee, the Los Angeles Superior Court and the California Court of Appeals for the 2<sup>nd</sup> Appellate District at the addresses set forth above. *See Higgins Decl., Ex. J.* In compliance with Fed. R. Bankr. P. 9022 and Del. Bankr. L.R. 9022-1, the affidavit of service was filed on the Bankruptcy Court Docket. Bankruptcy Court Docket no. 32522. As such, Grace complied with all relevant Delaware Bankruptcy Court service requirements, and Smolker was given proper notice and service of the Lift Injunction Order on March 4, 2015.

**C. State Notice Requirements**

During oral argument at the December 20, 2016 hearing for this motion, Smolker raised California Rule of Court 3.650 as a possible statute under which Grace allegedly failed to meet its duty to this Court. Under California Rule of Court Rule 3.650, any party “in the action who has knowledge of the termination or modification of the stay must serve and file a notice of termination or modification of stay” with the Court. CRC 3.650(d). Here, the facts and evidence clearly show that Smolker was notified by the Bankruptcy Court on March 4, 2015 that the bankruptcy injunction staying the instant matter had been lifted. *See Higgins Decl., Exhibit B and J.*

Despite having early notice regarding the form and content of the proposed order lifting the injunction by bankruptcy counsel for Smolker, Roger Higgins, and subsequently being properly notified and served the final order by the Bankruptcy Court, Smolker took no action to inform this Court of the termination of stay until he filed his opposition on December 6, 2016. Smolker even admits in his December 1, 2016 e-mail to Grace’s counsel that he has “[i]n the past [he has] received voluminous pleadings in the Grace bankruptcy,” essentially admitting that he had received the Bankruptcy Court’s order and not taken any action on it. *See Exhibit C to Reply to Motion to Dismiss.* He further admitted during the December 20, 2016 hearing that he “was not keeping in touch with the bankruptcy court” and that he did not “keep track” of the status of the bankruptcy matter. *Liu Decl., Ex. 1 at 11:3-5, 20-23.* Contrary to Smolker’s contention, Grace was under no obligation to further notify him beyond the minimum service requirements of the Delaware bankruptcy court. And even so, Grace still provided

early notice of the form and content of what ultimately became the Lift Injunction Order and still Smolker failed to fulfill his obligations to prosecute the instant litigation after the stay was lifted.

**D. Smolker's Contentions Under California Code of Civil Procedure 1013(a) and 1019.5**

During oral argument at the December 20, 2016 hearing on the instant motion, Smolker raised two specific California Code sections that he contends support his position regarding an alleged failure of service by Grace, California Code of Civil Procedure 1013(a) and 1019.5. California Code of Civil Procedure 1013(a) states in pertinent part:

In case of service by mail, the notice or other paper shall be deposited in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by mail; otherwise at that party's place of residence.

This code section address only what constitutes proper service. However, this issue has been discussed thoroughly above. On March 4, 2015, a copy of the Lift Injunction Order was served by first class mail to Smolker at his current address. *See Higgins Decl., Ex. J.* Proper protocol for service was followed and Smolker had acknowledged receipt of bankruptcy court papers at this address approximately a month before. Higgins Decl. at ¶2, *see also* Ex. D. to Higgins Decl. Based on a review of the bankruptcy court docket, there was no change of address submitted by Smolker between February and March of 2015, and as such it is a safe assumption that his service information was accurate and up to date. Thus, any reliance on this CCP 1013(a) fails as proper service of the Lift Injunction Order was made upon him on March 4, 2015.

California Code of Civil Procedure 1019.5 states in pertinent part:

(a) When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order shall be given by the prevailing party to all other parties or their attorneys, in the manner provided in this chapter, unless notice is waived by all parties in open court and is entered in the minutes.

(b) When a motion is granted or denied on the court's own motion, notice of the court's order shall be given by the court in the manner provided in this chapter, unless notice is waived by all parties in open court and is entered in the minutes.

This code section has no bearing on any arguments that either Smolker or Grace have raised in



1 connection with this Motion. The only motion practice that has occurred in at least the last five years in  
 2 the instant matter is the Motion currently before this court. Smolker has made no contention that this  
 3 Court has granted or denied any motions that require notice, or that there was any improper notice for  
 4 any motions that had been decided by this Court. As such, Smolker's reference to this code section has  
 5 no relevance to the issues of the instant motion and his reliance on this code section necessarily fails.

6 **E. Smolker's Delay In Informing this Court Of the Bankruptcy Stay Does Not Fall Under the**  
 7 **"Impracticable" Exception of Section 583.340**

8 Smolker's attempt in his opposition to shirk his responsibility to inform this Court  
 9 regarding the lifting of the bankruptcy stay does not fall under any of the exceptions to Code Civ. Proc.  
 10 § 583.310 as laid out in Code Civ. Proc. §583.340. Code Civ. Proc. § 583.340 specifically states:

11  
 12 In computing the time within which an action must be brought to trial pursuant to this  
 13 article, there shall be excluded the time during which any of the following conditions  
 14 existed:

15 (a) The jurisdiction of the court to try the action was suspended.

16 (b) Prosecution or trial of the action was stayed or enjoined.

17 (c) Bringing the action to trial, for any other reason, was impossible, impracticable, or  
 18 futile.

19 Smolker argues that under § 583.340(c), because Judge Fruin ordered proceedings in this matter stayed  
 20 on February 22, 2002 that it was "impossible and impractical." Opposition at 3:25-26. California case  
 21 law suggests otherwise. In *DeMota v. Superior Court* (1955) 130 Cal.App.2d 58, 62, it was held that  
 22 actions such as the delay in giving notices standing alone are insufficient to bring a matter within the  
 23 exceptions to the mandatory provisions of § 583.310. See also *Hayutin v. Rudnick* (1958) 158 Cal. App.  
 24 2d 593, 595.

25 As such, Smolker's delay in providing this Court with notice regarding the lifting of the  
 26 bankruptcy stay does not bring this matter within the exception of § 583.340(c).

27 **F. Sanctions for Willful Misrepresentation**

28 A basic tenet set forth in California law governing the conduct of lawyers is that frivolous  
 legal positions without merit are unacceptable. Under Business and Professions Code § 6068(c), a  
 lawyer has a duty to bring only "legal or just" claims or defenses. This tenet is further reinforced by

California Rule of Professional Conduct 3-200 which prohibits taking a legal position which the lawyer knows or should know is (1) without probable cause and for the purpose of harassing or maliciously injuring any person or (2) against the law (i.e. "frivolous"). Behavior that is in violation of this tenet includes misrepresentation of facts or assertion of unsupported facts and warrants the imposition of sanctions against the offending attorney. See Cal. Ct. R. 2.30(b), see also *Bryan v. Bank of America* (2001) 86 Cal. App. 4th 185, 194 (holding that "misrepresentation of 'specific facts' ... constitutes an unreasonable infraction of ... the California Rules of Court"); *Pierotti v. Torian* (2000) 81 Cal. App. 4th 17, 31 (upholding sanctions imposed against attorneys who egregiously violated court rules by asserting "unsupported facts").

Smolker asserted numerous times during oral argument on December 20, 2016 that he had no notice of Lift Injunction Order that was entered by the Delaware bankruptcy court. Liu Decl., Ex. 1 at 12:9-16. He further stated that the Grace parties had "lain in wait" and "ambushed" him with the motion to dismiss. *Id.* As demonstrated numerous times above, nothing could be further from the truth. Smolker was given ample notice regarding the form and content of the proposed Lift Injunction Order by Grace's bankruptcy attorney, Roger Higgins, Esq. See Higgins Decl. at ¶4, see also Ex. H and G to Higgins Decl. Smolker even provided input on the proposed order before it was entered by the bankruptcy court. The assertions and absurd arguments he has made to the Court to the contrary are patently false and warrant sanctions.

No less than \$4896.00 have been expended in costs and fees in the preparation of the motion, reply brief, and the supplemental briefing that resulted only due to Smolker's misrepresentations to this Court. As such, Grace requests that sanctions in this amount be imposed upon Smolker.

Sanctions should be imposed as follows:

4.0 hours to prepare the Motion to Dismiss @ \$195.00 per hour =	\$780.00
Filing fee for Motion to Dismiss =	\$60.00
Preparation of reply Brief – 2.8 hours @ \$195.00 per hour =	\$546.00
Attendance at December 20, 2016 hearing @ \$195.00 per hour	
2 attorneys- 3 hours each 6hrs @ \$195.00 =	\$1170.00

4.0 hours for Supplemental briefing, research, secure declaration from out of state counsel, voluminous exhibits @		
\$195.00 per hour	=	\$780.00
Anticipated Reply brief – 2.0 hours @ \$195.00	=	\$390.00
Attendance at January 17, 2017 hearing @ \$195.00 per hour		
2 attorneys – anticipated 3 hours each - 6 hours	=	\$1170.00
TOTAL		\$4896.00

This amount does not include billable hours spent by moving Defendant's Bankruptcy Counsel, or in-house counsel to assist in the preparation of this pleading.


### III. CONCLUSION

For the foregoing reasons, Grace respectfully request that this Court grant its motion to dismiss for failure to prosecute. The five-year mandatory statutory deadline to bring this case to trial has expired. Accordingly, the court must dismiss this matter with prejudice. Furthermore, Grace requests that monetary sanctions be imposed on Gary Smolker and/or The law offices of Gary Smolker for his misrepresentations to the court, and the time incurred by moving defendant to seek this dismissal.

Dated: December 30, 2016

BORTON PETRINI, LLP

By

  
ROSEMARIE S. LEWIS, JEFFREY Z. LIU  
Attorneys for Cross-Defendant W.R. GRACE  
& COMPANY and Grace Davison.

910X403501

DEC. OF  
JILRU

**Declaration of Jeffrey Z. Liu**

I, Jeffrey Z. Liu, declare as follows.

1. I am admitted to practice law in the State of California. I am an attorney of record for Cross-Defendant W.R. GRACE & COMPANY and Grace Davison. I have personal knowledge of each and every fact stated in this declaration, except as to those facts as to which I am informed and believe, where I have indicated as such. If called to testify, I could testify competently thereto.

2. Attached as Exhibit 1 to my declaration is a true and correct copy of the rough draft of the court reporter's transcript for the December 20, 2016 hearing on motion to dismiss.

3. Our firm expended no less than four hours in attorney time in drafting and preparing the motion to dismiss. Our firm bills at a rate of \$195.00 per attorney hour on this matter.

4. Our firm expended no less than two point eight (2.8) hours in attorney time in drafting and preparing the reply to the motion to dismiss.

5. Both Rosemarie Lewis and I attended the December 20, 2016 hearing on the motion to dismiss. We each billed for three hours of time for attendance of the hearing (including travel time).

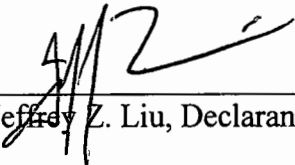
6. Our firm expended no less than four hours in attorney time for supplemental briefing, research, preparation of voluminous exhibits, and communication and securing a declaration from out of state counsel in preparing the supplemental brief for the motion to dismiss.

7. While it has not occurred yet, our firm anticipates that it will spend at least two hours of attorney time in preparing the reply brief to supplemental briefing for the motion to dismiss.

8. While it has not occurred yet, our firm further anticipates that it will expend approximately three hours apiece for the two attorneys that plan to attend the hearing on supplemental briefing currently scheduled for January 17, 2017.

9. As is set forth in these moving papers, the total sought in the way of monetary sanctions is \$4896.00.

1 I declare under penalty of perjury under the laws of the State of California that the  
2 following is true and correct on this 30th day of December, 2016 at Los Angeles, California.

3  
4   
Jeffrey Z. Liu, Declarant

9106703551

Hearing - ROUGH JT

1

1

2

3

4 THE COURT: GOOD MORNING, EVERYONE. ALL RIGHT.

5 MS. LEWIS: ROSEMARY LEWIS FOR MOVING PARTIES

6 GRACE DAVISON AND W.R. GRACE & COMPANY.

7 MR. LIU: GOOD MORNING, YOUR HONOR. JEFFREY LIU,

8 ALSO FOR W.R. GRACE & COMPANY AND GRACE DAVISON.

9 THE COURT: ALL RIGHT. AND?

10 MR. SMOLKER: GOOD MORNING, YOUR HONOR. GARY

11 SMOLKER FOR GARY SMOLKER, AND NOT FOR ALICE GRAHAM.

12 THE COURT: NOT FOR ALICE WHO?

13 MR. SMOLKER: GRAHAM.

14 THE COURT: HOW DO YOU SPELL THAT LAST NAME?

15 MR. SMOLKER: G-R-A-H-A-M, PREVIOUSLY KNOWN AS

16 ALICE GRAHAM SMOLKER.

17 THE COURT: ALL RIGHT. WELL, LET'S TALK JUST A

18 MOMENT ABOUT ALICE GRAHAM. I'VE FORGOTTEN. IS SHE AN

19 ATTORNEY?

20 MR. SMOLKER: SHE IS.

21 THE COURT: IS SHE REPRESENTING HERSELF IN THIS

22 MATTER?

23 MR. SMOLKER: I BELIEVE SHE IS.

24 THE COURT: HAS THERE BEEN A SUBSTITUTION OF

25 ATTORNEYS FILED?

26 MR. SMOLKER: I DON'T KNOW.

27 MS. LEWIS: EXCUSE ME, YOUR HONOR, IF I MAY.

28 MS GRAHAM DISMISSED W.R. GRACE AND THE GRACE DAVISON

THIS IS AN UNEDITED AND UNCERTIFIED ROUGH DRAFT

EX 1

9106605661



Hearing - ROUGH JT

2

1 ENTITIES BACK IN 2007, IN EXCHANGE FOR A WAIVER OF  
2 COSTS, SO SHE'S NO LONGER A PARTY TO THIS ACTION.  
3 THAT'S WHY SHE WASN'T MENTIONED IN OUR PLEADINGS.

4 THE COURT: ALL RIGHT. WELL, I DIDN'T KNOW THAT,  
5 AND I ORDINARILY WOULDN'T KNOW SOMETHING LIKE THAT.

6 MS. LEWIS: AND I APOLOGIZE. IT WAS AN OVERSIGHT.  
7 WE SHOULD HAVE CHARACTERIZED THAT SITUATION WHEN WE LAID  
8 OUT WHO THE PARTIES WERE, SO I APOLOGIZE FOR THAT  
9 CONFUSION.

10 THE COURT: OKAY. SO HAVE YOU --

11 MR. SMOLKER: CAN I INTERRUPT FOR A SECOND?

12 THE COURT: PLEASE.

13 MR. SMOLKER: I WAS NEVER GIVEN NOTICE OF THAT. I  
14 NEVER SAW THE DISMISSAL OR ANYTHING LIKE THAT, SO I  
15 DON'T KNOW IF A DISMISSAL HAS BEEN FILED OR HASN'T BEEN  
16 FILED, BUT IT WOULD SEEM THAT IF WHAT SHE SAYS IS TRUE,  
17 THAT HAPPENED WHILE BOTH YOUR STAY AND THE BANKRUPTCY  
18 STAY WERE IN EFFECT, OR WHATEVER THAT MEANS.

19 BUT IT SEEMS LIKE WE REALLY HAVE TO DEAL  
20 WITH TWO DIFFERENT STAY ORDERS HERE. WE HAVE TO DEAL  
21 WITH YOUR STAY ORDER IN FEBRUARY 22ND, 2002, AND THE  
22 BANKRUPTCY STAY ORDER, WHICH, ACCORDING TO THEM, WAS  
23 LIFTED IN 2013 OR 2014, WHICH WE WILL ALSO ADDRESS  
24 LATER.

25 BUT IN ANY EVENT, 2007 IS DEFINITELY WITHIN  
26 THE TIME PARAMETERS. AND WHETHER SHE WAS SERVED OR NOT  
27 IS JUST ANOTHER EXAMPLE OF THE PROCEDURAL MORASS THAT  
28 THIS CASE PRESENTS, WHICH I WILL TALK TO AT LENGTH WHEN

THIS IS AN UNEDITED AND UNCERTIFIED ROUGH DRAFT

Hearing - ROUGH JT

3

1 WE GET TO THE MERITS OF THE MOTION.

2 THE COURT: WELL, ALICE GRAHAM CAN ALWAYS DISMISS  
3 HER CASE, NOTWITHSTANDING ANY STAY. I DON'T KNOW  
4 WHETHER SHE SERVED THAT DISMISSAL OR NOT, OR WHETHER YOU  
5 SERVED IT, BUT, APPARENTLY, SHE'S OUT OF THIS CASE.

6 MS. LEWIS: SHE IS.

7 THE COURT: HAVE BOTH OF YOU RECEIVED A COPY OF  
8 THE TENTATIVE RULING?

9 MS. LEWIS: YES.

10 MR. LIU: YES, YOUR HONOR.

11 THE COURT: ALL RIGHT. DOES ANYONE WISH TO ARGUE  
12 AGAINST IT?

13 MR. SMOLKER: YES.

14 THE COURT: PLEASE PROCEED. AND GO AHEAD AND SIT  
15 DOWN IF YOU WISH.

16 MR. SMOLKER: DO YOU MIND IF I STAND?

17 THE COURT: YOU CAN STAND IF YOU WANT.

18 MR. SMOLKER: OKAY. THANK YOU.

19 IT'S VERY NICE TO SEE YOU AGAIN, AND IT'S  
20 ALWAYS A PLEASURE TO READ YOUR RULINGS. I APPRECIATE  
21 TALKING TO YOU, AS I'M SURE YOU APPRECIATE LISTENING TO  
22 ME.

23 HERE WOULD BE MY CRITIQUE OF YOUR TENTATIVE  
24 RULING. THIS IS MY CRITIQUE OF YOUR TENTATIVE RULING.  
25 AND I'M GOING TO GO IN REVERSE ORDER.

26 FIRST, IN YOUR TENTATIVE RULING, YOU SAY  
27 YOU'RE GOING TO GRANT THE MOTION AND SIGN THE ORDER THAT  
28 GRACE FILED. THAT IS COMPLETELY WRONG. LET ME TELL YOU

THIS IS AN UNEDITED AND UNCERTIFIED ROUGH DRAFT

11/20/21

♀

Hearing - ROUGH JT

1 WHY. JUST THAT PART OF YOUR ORDER IS WRONG, EVEN IF  
2 EVERYTHING ELSE WAS RIGHT.

3 THE REASON THAT IS COMPLETELY WRONG IS THAT  
4 ACCEPTING GRACE'S THEORY OF WHAT THE FACTS ARE AND YOUR  
5 INTERPRETATION AND, MAYBE, FAMILIARITY WITH THE FACTS OR  
6 NOT, GRACE CAN ONLY MOVE TO HAVE THE CASE DISMISSED  
7 AGAINST GRACE AND GRACE DAVISON. IT CANNOT MOVE TO HAVE  
8 THE ENTIRE CASE DISMISSED AGAINST THE OTHER PARTIES.

9 THE ORDER SAYS --

10 THE COURT: I AGREE WITH THAT.

11 MR. SMOLKER: OKAY.

12 THE COURT: AND I BELIEVE I SAID THAT IN MY  
13 TENTATIVE, AN THE ORDER THAT THEY SUBMITTED IS A  
14 DISMISSAL ONLY AS TO GRACE AND GRACE DIVISION.

15 MR. SMOLKER: NO, THAT ISN'T WHAT THE ORDER SAYS.

16 THE COURT: WELL, HOLD IT JUST A MOMENT. WE  
17 CAN'T -- WE HAVE TO PROCEED ON EACH ISSUE ONE BY ONE,  
18 AND I HAVE THE ORDER HERE, AND ALTHOUGH THEY MISSPELLED  
19 "DIVISION" REPEATEDLY AS "DAVISON."

20 MS. LEWIS: NO, IT IS "DAVISON." IT'S NOT  
21 "DIVISON."

22 THE COURT: OH, I THOUGHT IT WAS GRACE DIVISION.

23 MS. LEWIS: NO, IT'S GRACE DAVISON.

24 THE COURT: OKAY. LET ME SEE WHAT THE ORDER SAYS.  
25 IT SAYS: FOR GOOD CAUSE APPEARING, THE COURT GRANTS  
26 W.R. GRACE & CO. AND GRACE DAVISON'S MOTION TO DISMISS,  
27 AND DISMISSES THIS CASE WITH PREJUDICE.

28 PROBABLY SHOULD SAY "AS TO THEM."

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Hearing - ROUGH JT

1 MR. SMOLKER: YES, AT THE MINIMUM.

2 THE COURT: WELL, I THINK THAT'S ASSUMED.

3 MR. SMOLKER: I DON'T ASSUME ANYTHING.

4 THE COURT: GOOD POINT. ALL RIGHT.

5 MR. SMOLKER: SO THAT WOULD BE MY FIRST STATEMENT

6 --

7 THE COURT: OKAY.

8 MR. SMOLKER: -- OR CORRECTION, FOR YOU TO THINK

9 ABOUT.

10 THE SECOND THING I WOULD BRING TO YOUR  
11 ATTENTION THAT I DISAGREE WITH IS YOUR TENTATIVE ORDER  
12 SAYS "BANKRUPTCY COURT ISSUES AND SERVES ITS ORDER  
13 LIFTING THE AUTOMATIC STAY."

14 THE DOCUMENTS WHICH THEY SUBMITTED INDICATE  
15 THAT THAT ISN'T THE CASE. AND WHAT IN THE WORLD THE  
16 DOCUMENTS THEY SUBMITTED ARE OR MEAN IS SOMETHING I'LL  
17 GET INTO IN A MINUTE.

18 THE DOCUMENTS THEY SUBMIT SAY THAT SOME  
19 ATTORNEY EMPLOYED BY THE FIRM OF PACHULSKI, STANG, AND  
20 BLAH, BLAH, BLAH SERVED THIS ORDER.

21 SO WHATEVER THIS ORDER IS, WHICH WE DON'T  
22 KNOW WHAT IT IS BECAUSE IT'S NOT ATTACHED TO THE PROOF  
23 OF SERVICE --

24 THE COURT: WELL, WAIT A MINUTE. IT'S SIGNED, AND  
25 IT IS ATTACHED.

26 MR. SMOLKER: NO, IT'S NOT, NOT IN MY COPY.

27 THE COURT: THE BANKRUPTCY JUDGE IS  
28 KEVIN-SOMETHING.

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6

1 MR. SMOLKER: YES. BUT THAT -- THAT IS NOT --

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Hearing - ROUGH JT

2 THE COURT: YEAH, THAT'S KEVIN CAREY. IT SAYS,  
3 "ORDER LIFTING INJUNCTION IN PERPETUATION LITIGATION  
4 CAPTION TIG VERSUS SMOLKER." SO THAT'S THE ORDER.

5 MR. SMOLKER: YEAH, BUT THAT WASN'T SIGNED BY  
6 THE -- THAT WASN'T SERVED BY THE COURT, NUMBER ONE, AND  
7 YOUR THING SAYS THE COURT SERVED IT.

8 NUMBER TWO, THE PROOF OF SERVICE -- AND  
9 THERE'S NOT A PROOF OF SERVICE ATTACHED TO THIS, SO WE  
10 DON'T KNOW THAT THIS DOCUMENT THAT YOU HAVE IN FRONT OF  
11 YOU WAS SERVED ON ANYONE.

12 THE PROOF OF SERVICE, WHICH IS THEIR  
13 EXHIBIT -- THEIR NEXT EXHIBIT.

14 THE COURT: RIGHT.

15 MR. SMOLKER: EXHIBIT B, IS SIGNED BY SOMEONE  
16 WHO'S AN ATTORNEY, SAYING, "I AM SERVING," AND THEN THEY  
17 GIVE THE NAME OF SOMETHING. AND THE NAME THEY GIVE OF  
18 THE SOMETHING THAT'S SERVED IS NOT AN ORDER LIFTING THE  
19 STAY.

20 IT'S SIGNED, "37TH OMNIBUS OBJECTION TO  
21 CERTAIN CLAIMS FILED REGARDING," BLAH, BLAH, BLAH.

22 IT DOESN'T SAY IT IS AN ORDER OF THE JUDGE  
23 LIFTING THE STAY.

24 NOW, GRACE FILED SOMETHING AFTER THE  
25 BANKRUPTCY WAS FILED. THESE ARE THE LITTLE POINTS THAT  
26 I'M GLAD TO HELP YOU WITH, AND EVERYBODY ELSE. I KNOW  
27 THIS IS EXHAUSTING. AND THERE ARE 64 VOLUMES OF COURT  
28 FILES.

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7

1 SO THE VERY CONCEPT THAT THIS HASN'T BEEN

Hearing - ROUGH JT  
2 DILIGENTLY PURSUED WILL BE --

3 THE COURT: HOLD ON JUST A MOMENT. CAN I TURN TO  
4 THE MOVING PARTY WITH RESPECT TO THIS SERVICE ISSUE?

5 MR. SMOLKER: YEAH, OKAY. I JUST -- I HAVE A  
6 WHOLE LIST OF WHAT THEY DID WRONG, IF YOU'D LIKE ME TO  
7 GIVE YOU EVERYTHING WRONG WITH THE SERVICE ISSUE.

8 THE COURT: OKAY. HOW LONG IS YOUR LIST?

9 MR. SMOLKER: IT'S VERY LONG, BECAUSE THEY DID  
10 EVERY SINGLE THING WRONG. THE PROOF OF SERVICE  
11 DOESN'T -- ISN'T SIGNED BY SOMEONE WHO SAYS THEY'RE AN  
12 ATTORNEY ADMITTED TO PRACTICE LAW. IT DOESN'T SAY WHERE  
13 THEY RESIDE. IT DOESN'T SAY IT WAS PUT IN A SEALED  
14 ENVELOPE, POSTAGE PREPAID. IT DOESN'T SAY WHAT IT IS.

15 THE COURT: HOLD IT JUST A MOMENT. WE'RE  
16 FOLLOWING FEDERAL PROCEDURE RATHER THAN STATE PROCEDURE,  
17 BUT LET ME JUST GET A LITTLE CLUE AS TO WHAT THE MOVING  
18 PARTIES ARE GOING TO SAY ABOUT THE SERVICE ISSUE.

19 MR. SMOLKER: THANK YOU.

20 MR. LIU: YES, YOUR HONOR. YOUR HONOR, IF YOU  
21 NOTICE ON THE TOP -- EXCUSE ME.

22 IF YOU NOTICE ON THE TOP OF THE PAGE, YOUR  
23 HONOR, THERE'S THE ECF.

24 THE COURT: EXHIBIT A OR EXHIBIT B?

25 MR. LIU: FOR BOTH OF THEM, YOUR HONOR.

26 THE COURT: YEAH, I SEE CASE NUMBER SUCH-AND-SUCH,  
27 DOCKET NUMBER SUCH-AND-SUCH.

28 IS THAT THE ECF?

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8

1 MR. LIU: THAT'S THE ECF, YOUR HONOR. AND I WOULD  
2 SUBMIT TO THE COURT THAT WHEN THOSE DOCUMENTS ARE SERVED

Hearing - ROUGH JT

3 UPON THE PARTIES AS TO A PARTICULAR ACTION, THEY'RE  
4 SERVED ELECTRONICALLY BASED OFF THE ECF SYSTEM.

5 THE COURT: ARE THEY ACTUALLY SERVED TO THE E-MAIL  
6 OF THE PARTIES, OR ARE THEY SIMPLY PUT ON THE INTERNET  
7 SITE SO THAT THE PARTIES CAN LOOK AT THE SITE  
8 PERIODICALLY?

9 MR. LIU: THEY'RE GIVEN NOTICE THAT A DOCUMENT HAS  
10 BEEN FILED BY THE COURT, GENERALLY, AND THEY'RE GIVEN  
11 ACCESS TO IT THROUGH THAT E-MAIL, YOUR HONOR.

12 MR. SMOLKER: WELL, I CAN TELL YOU FOR SURE, I  
13 DIDN'T GET ANY E-MAILS FROM ANYBODY ABOUT THIS.

14 MR. LIU: AND, YOUR HONOR, I'LL SUBMIT TO THE  
15 COURT THAT THEY ALSO MAILED EACH OF THE PLEADINGS THAT  
16 WE'VE SUBMITTED AS EXHIBITS TO THE MOVING PAPERS.

17 THE COURT: DO WE HAVE ANYONE TESTIFYING TO THAT?  
18 FOR INSTANCE, DOES THIS PATRICIA CUNIF --  
19 C-U-N-N-I-F-F -- EXCUSE ME, ONE N -- C-U-N-I-F-F --  
20 TESTIFY TO THE MAILING OF THE NOTICE?

21 MR. LIU: THERE'S NOTHING CURRENTLY ON RECORD,  
22 YOUR HONOR.

23 THE COURT: SHE SAID SHE CAUSED A COPY OF THE  
24 FOLLOWING DOCUMENTS TO BE SERVED UPON THE ATTACHED  
25 SERVICE LIST IN THE MANNER INDICATED. FIRST NAME ON THE  
26 SERVICE LIST -- WELL, MAYBE NOT THE FIRST NAME. BUT,  
27 CERTAINLY, GARY SMOLKER WAS ON THE LIST WHEN I LOOKED  
28 THIS MORNING.

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9

1 MR. SMOLKER: I AM ON THE LIST, BUT THIS DOCUMENT  
2 DOESN'T SAY THAT WHAT THEY ARE SERVING IS THE ORDER

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Hearing - ROUGH JT

3 LIFTING THE STAY.

4 THE COURT: WHAT IT SAYS IS THE 37TH OMNIBUS  
5 OBJECTION TO CERTAIN CLAIMS FILED REGARDING PRE-PETITION  
6 LITIGATION, CAPTION TIG INSURANCE VERSUS GARY SMOLKER,  
7 CASE NUMBER SUCH-AND-SUCH, WHICH IS THE LOS ANGELES CASE  
8 NUMBER, MENTIONS JUDGE JANAVS, J-A-N-A-V-S, SUBSTANTIVE  
9 OBJECTIONS. SO I PRESUME IF I LOOKED AT THE 37TH  
10 OMNIBUS OBJECTION, IT WOULD CONNECT IT UP.

11 MR. LIU: AND, YOUR HONOR --

12 MR. SMOLKER: WELL, UNFORTUNATELY, WE DON'T HAVE  
13 THAT. AND UNFORTUNATELY FOR THEM, THE LAW IS VERY CLEAR  
14 ON WHAT THEY'RE SUPPOSED TO DO WHEN AN INJUNCTION IS  
15 LIFTED, ESPECIALLY WHEN THEY'RE A PARTY THAT, IN THE  
16 BEGINNING, FILED A NOTICE OF THE BANKRUPTCY STAY.

17 THE CODE SAYS THAT THE PARTY WHO FILES THE  
18 NOTICE OF BANKRUPTCY STAY HAS TO FILE SOMETHING SAYING  
19 THAT THAT BANKRUPTCY STAY HAS BEEN LIFTED. THEY NEVER  
20 DID IT. IF YOU LOOK AT --

21 THE COURT: COUNSEL, LET ME JUST FIND OUT WHAT THE  
22 RESPONSE IS GOING TO BE.

23 MR. LIU: YOUR HONOR, OUR RESPONSE IS TWOFOLD. IF  
24 WE LOOK AT EXHIBIT A ON THE VERY FIRST LINE OF THE  
25 ORDER, IT SAYS: UPON CONSIDERATION OF THE 37TH OMNIBUS  
26 OBJECTION TO CERTAIN CLAIMS FILED REGARDING THE  
27 PRE-PETITION LITIGATION CAPTION TIG INSURANCE COMPANY V.  
28 GARY SMOLKER, ET AL.

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10

1 AND THE ORDER FOLLOWS THAT. THIS WAS THE  
2 ORDER THAT WAS ASSOCIATED FOLLOWING THE FILING OF THE  
3 37TH OMNIBUS. AND IN ADDITION TO THAT, WE MENTIONED IN



Hearing - ROUGH JT

4 OUR REPLY THAT DURING THE CORRESPONDENCE THAT WAS  
5 EXCHANGED BETWEEN MR. SMOLKER AND OUR OFFICE FOLLOWING  
6 THE FILING OF THE MOVING PAPER, MR. SMOLKER,  
7 ESSENTIALLY, ADMITTED THAT HE DID RECEIVE FILINGS FROM  
8 THE BANKRUPTCY COURT ON A REGULAR BASIS.

9 THE COURT: ALL HE SAID WAS HE RECEIVED VOLUMINOUS  
10 PAPERS FROM THE BANKRUPTCY COURT.

11 MR. LIU: YES, YOUR HONOR.

12 THE COURT: AND WHETHER THAT'S ON A REGULAR BASIS  
13 OR NOT, I DON'T KNOW.

14 MR. LIU: YES, YOUR HONOR.

15 MR. SMOLKER: AND THAT IS NOT SAYING THAT THIS WAS  
16 RECEIVED, AND THIS IS NOT EXCUSING THE CODE OF CIVIL  
17 PROCEDURE'S REQUIREMENT THAT THE PERSON WHO FILED THE  
18 NOTICE OF STAY IS REQUIRED TO FILE A NOTICE WHEN IT'S  
19 LIFTED.

20 AND, ALSO, THE RULES --

21 THE COURT: WELL, WAIT A MINUTE NOW. MAYBE WHAT  
22 WE SHOULD DO IS LET SUPPLEMENTAL BRIEFING BE PROVIDED ON  
23 THIS POINT. I'M ALSO CONCERNED, OF COURSE, THAT AS THE  
24 CROSS-COMPLAINANT, I WOULD THINK THAT YOU'D BE IN TOUCH  
25 WITH THE BANKRUPTCY COURT TO FIND OUT WHAT THEY'RE DOING  
26 ON THE CASE.

27 MR. SMOLKER: I HAVE YOUR ORDER OF THE 22ND,  
28 TELLING ME THAT THIS IS STAYED IN ALL PROCEEDINGS. AND

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11

1 I WAS, ON THE BASIS OF YOU SAYING THAT, I'M NOT SUPPOSED  
2 TO DO ANYTHING UNTIL YOU LIFTED IT.

3 I WAS NOT KEEPING IN TOUCH WITH THE

Hearing - ROUGH JT

4 BANKRUPTCY COURT, AND I CAN ONLY TELL YOU THAT IN TERMS  
5 OF PRACTICALITY, THIS IS A GIGANTIC BANKRUPTCY. AND I  
6 DO NOT UNDERSTAND THE INS AND OUTS OF THIS, AND THERE'S  
7 NOTHING THAT CLEARLY SAYS THAT THIS IS UP, IN WHAT WE  
8 ARE OVER OR CHANGED.

9 AND WHAT WE HAVE HERE IS THE POLICY OF THIS  
10 STATE TO TRY CASES ON THE MERITS. WE HAVE SOMEONE WHO  
11 DEFINITELY KNEW THE STAY WAS LIFTED. THAT'S THESE  
12 PEOPLE, THE GRACE PEOPLE. AND THEN THEY LAY IN WAIT AND  
13 AMBUSH ME AFTER THEY DON'T DO WHAT THEY'RE SUPPOSED TO  
14 DO. AND SO I AM SUPPOSED TO BE PENALIZED BECAUSE THEY  
15 DIDN'T FOLLOW WHAT THEIR CLEAR OBLIGATIONS ARE, AND THEN  
16 THEY'RE GOING TO SAY "GOT YOU."

17 THIS IS A PURE SIMPLE "GOT YOU" THING.  
18 WHETHER THEY GOT ME OR NOT, THIS IS A PURE, SIMPLE "GOT  
19 YOU" THING.

20 THEY HAD A DUTY TO TELL. THEY KNEW IT.  
21 THEY COULD HAVE TOLD IT IN A SIMPLE WAY, AND NOW "GOT  
22 YOU." I'M SUPPOSED TO LOOK AT THIS IMMENSE BANKRUPTCY  
23 AND KEEP TRACK OF IT, AND THEN TELL YOU? THAT ISN'T THE  
24 WAY THE CODE IS SET UP. THE WAY THE CODE IS SET UP IS  
25 THEY'RE SUPPOSED TO TELL US. THEY DON'T EVEN SERVE  
26 NOTICE THE RIGHT WAY.

27 NOW, MAYBE FEDERAL --

28 THE COURT: EXCUSE ME. I DON'T REMEMBER THAT YOU

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12

1 RAISED THE ISSUE THAT GRACE IS REQUIRED TO ADVISE WHEN  
2 THE BANKRUPTCY IS TERMINATED.

3 MR. SMOLKER: I THINK I DID IN MY PAPERS, YEAH.

4 THE COURT: DID YOU CITE A CODE SECTION?

Hearing - ROUGH JT

5 MR. SMOLKER: I -- I DON'T KNOW. I THINK I JUST  
6 SAID THEY DIDN'T PROPERLY SERVE IT, AND I GOT THEIR  
7 LETTER FROM THEM ON DECEMBER 11TH. SHE SAYS IN HER  
8 LETTER, WHICH I ATTACHED, THAT SHE AGREES THAT I HAVEN'T  
9 BEEN SERVED WITH PROPER NOTICE.

10 THE COURT: WELL, THIS IS A HIGHLY TECHNICAL  
11 MOTION.

12 MR. SMOLKER: YES.

13 THE COURT: I MEAN, IF YOU'RE ASSERTING THAT THE  
14 PARTY IN BANKRUPTCY, PARTICULARLY IN A CHAPTER 11, IS  
15 REQUIRED TO GIVE NOTICE TO ANY -- TO THE PARTIES IN ANY  
16 LITIGATION THAT HAS BEEN STAYED BECAUSE OF THE  
17 BANKRUPTCY, THEN THE BANKRUPTCY IS TERMINATED.

18 MR. SMOLKER: IT'S NOT TERMINATED. THAT'S ANOTHER  
19 THING. THIS BANKRUPTCY IS NOT TERMINATED.

20 THE COURT: WELL, THAT THE AUTOMATIC STAY IS  
21 LIFTED, THEN YOU'VE GOT A POINT.

22 MR. SMOLKER: YES, THAT IS WHAT IT IS.

23 THE COURT: I'D LIKE TO GET THE STATUTORY  
24 AUTHORITY.

25 MR. SMOLKER: I CAN TELL IT TO YOU, BECAUSE I HAVE  
26 IT IN MY NOTES.

27 THE COURT: CAN YOU GIVE ME THE AUTHORITY NOW?

28 MR. SMOLKER: YES.

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13

1 THE COURT: WHAT IS IT?

2 MR. SMOLKER: OKAY. LET ME LOOK AT MY NOTES. I'M  
3 A LITTLE BIT NERVOUS, AS YOU MIGHT IMAGINE.

4 THE COURT: AND I --

Hearing - ROUGH JT

5 MR. SMOLKER: BUT, YES, I DO HAVE THE EXACT CODE  
6 SECTIONS.

7 THE COURT: AND I AM THINKING, MR. SMOLKER AND  
8 DEFENSE COUNSEL, THAT I PROBABLY NEED TO PUT THIS ON  
9 SECOND CALL, BECAUSE I GUESS THE ARGUMENT'S GOING TO GO  
10 LONGER THAN I THOUGHT IT WAS.

11 MS. LEWIS: THAT'S FINE, YOUR HONOR.

12 MR. SMOLKER: WOULD YOU LIKE ME TO MENTION TWO  
13 THINGS, OR SHOULD I WAIT FOR SECOND CALL?

14 THE COURT: NO. WHY DON'T YOU MENTION TWO THINGS  
15 SO I CAN THINK ABOUT IT.

16 MR. SMOLKER: OKAY. ATTACHED TO MY EXHIBITS AND  
17 MY CORRESPONDENCE WITH HER -- HER BEING MS. LEWIS -- IS  
18 A LETTER DATED DECEMBER 1ST, 2016, IN WHICH SHE SAYS:  
19 GRACE DOES NOT CLAIM IRRELEVANT BANKRUPTCY ORDERS HAVE  
20 BEEN PROPERLY SERVED AND FILED WITH THE LOS ANGELES  
21 SUPERIOR COURT.

22 THE EXACT QUOTE IS -- I ASKED -- SEE, I WAS  
23 TRYING TO GET ALL THIS CLEAR SO I WOULD BE ABLE TO TELL  
24 YOU WHAT REALLY HAPPENED. I ASKED HER FOR THE  
25 BANKRUPTCY ORDER SO I WOULD KNOW WHAT WE'RE TALKING  
26 ABOUT.

27 SHE THEN WROTE BACK TO ME, "I HAVE NOT  
28 STATED OR CLAIMED IN MY MOTION THAT RELEVANT BANKRUPTCY

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14

1 ORDERS HAVE BEEN SERVED ON YOU."

2 IT'S ON HER DECEMBER 11 --

3 THE COURT: SERVED ON WHOM?

4 MR. SMOLKER: FILED WITH THE LOS ANGELES -- SERVED  
5 AND FILED WITH THE LOS ANGELES SUPERIOR COURT.

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Hearing - ROUGH JT

6 THE COURT: SEE, I DON'T -- I DON'T KNOW THAT A  
7 SERVICE ON THE COURT IS REQUIRED, IN PART BECAUSE THE  
8 COURT'S PASSIVE. IN OTHER WORDS, SOMETHING'S FILED AND  
9 PUT IN THE FILE, BUT I DON'T SEE IT.

10 IT'S THE PARTY -- PARTIES TO THE LITIGATION  
11 THAT SHOULD BE THE ACTIVE PERSONS TO DO WHATEVER IS  
12 REQUIRED TO GET THEIR CASE TO TRIAL.

13 MR. SMOLKER: I DO NOT HAVE ANY COMMENT ON THAT,  
14 PRO OR CON, AGREE OR DISAGREE. I INTERPRETED HER LETTER  
15 TO MEAN THAT SHE WAS NOT SAYING IT WAS PROPERLY SERVED  
16 ON ME.

17 THERE IS A PROCEDURE FOR HOW TO DO THINGS,  
18 AND THEY DID NOT FOLLOW THE PROCEDURE. AND THE  
19 PROCEDURE IN THIS CASE ACTUALLY MAKES A LOT OF SENSE,  
20 BECAUSE THEN EVERYBODY WOULD KNOW WHAT'S GOING ON, AND I  
21 HAVE THE CODE SECTIONS.

22 THE COURT: WELL, IS THERE A STATUTE THAT REQUIRES  
23 THE BANKRUPT PARTY, WHEN A STAY IS LIFTED, THAT HAS  
24 STOPPED CERTAIN STATE AND FEDERAL LITIGATION, TO NOTIFY  
25 THE PARTIES TO THAT LITIGATION THAT THE STAY IS LIFTED?

26 MR. SMOLKER: I THINK THERE ARE TWO DIFFERENT CODE  
27 SECTIONS. ONE REQUIRES SOMEONE THAT HAS -- WHOEVER HAS  
28 FILED THE NOTICE OF THE BANKRUPTCY STAY IS REQUIRED TO

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15

1 SERVE A NOTICE THAT THE BANKRUPTCY STAY IS NOT IN  
2 EFFECT:

3 AND THEN THERE'S A SECOND CODE REQUIREMENT  
4 THAT WHEN AN ORDER IS CHANGED OR MODIFIED, THE PARTY WHO  
5 OBTAINED THE ORDER MUST SERVE A COPY OF THAT ORDER ON

Hearing - ROUGH JT

6 PEOPLE. AND THEN THERE'S ANOTHER CODE SECTION SAYING  
7 WHAT THEY ARE. AND THOSE ARE CCP SECTION 1013(A) AND  
8 CCP 1019.5, AND CALIFORNIA RULE OF COURT 3.650, PAREN D,  
9 CLOSED PAREN.

10 AND MY CONCLUSION, AFTER READING THOSE  
11 VARIOUS CODES AND RULES THAT I READ TO YOU, IS THAT IT  
12 WAS GRACE'S DUTY AND OBLIGATION, HAVING FIRST FILED A  
13 NOTICE OF BANKRUPTCY STAY, TO FILE A DOCUMENT IN THE  
14 COURT AND SERVE IT ON ME, THESE ATTORNEYS STANDING NEXT  
15 TO ME, SAYING THAT BANKRUPTCY STAY IS NOT IN EFFECT, OR  
16 WHATEVER THEY WANT TO SAY HOW IT IT'S DONE.

17 THEY DON'T CLAIM TO HAVE DONE THAT. I  
18 COULDN'T FIND THEM HAVING DONE IT WHEN I LOOKED AT THE  
19 CASE SUMMARY, AND I DON'T REMEMBER EVER RECEIVING SUCH A  
20 THING, BECAUSE THAT WOULD DEFINITELY BE -- THERE'S --

21 THE COURT: CAN I -- WOULD YOU MIND IF I ASKED YOU  
22 TO WAIT FOR SECOND CALL?

23 MR. SMOLKER: I'D LOVE TO WAIT FOR SECOND CALL.  
24 CAN I GO GET A GLASS OF WATER FIRST?

25 THE COURT: NOT FIRST. DURING THE WAIT.

26 MR. SMOLKER: DURING THE WAIT?

27 THE COURT: GO AND GET A CUP OF COFFEE. AND SIT.

28 MS. LEWIS: CAN I ADDRESS TWO ISSUES RAISED BY

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16

1 MR. SMOLKER, OR WOULD YOU PREFER I WAIT? ONE IS ABOUT  
2 THE E-MAILS, WHICH IS MISLEADING. I'M HAPPY TO SHOW THE  
3 JUDGE THE STRING OF E-MAILS.

4 THE COURT: I'M NOT WORRIED ABOUT THAT. I'M MORE  
5 WORRIED ABOUT WHETHER THERE'S SOME DUTY ON THE PART OF  
6 GRACE TO NOTIFY ANYBODY. AND, SECONDLY, WHETHER OR NOT

Hearing - ROUGH JT

7 WE HAVE PROPER EVIDENCE OF A SERVICE OF THE LIFTING OF  
8 THE AUTOMATIC STAY, WHICH APPARENTLY, IS BASED UPON THE  
9 37TH OBJECTION TO THE BANKRUPTCY IN THIS MOTION.

10 IF WE DON'T, I THINK WE OUGHT TO GET IT,  
11 BECAUSE THIS IS A HIGHLY TECHNICAL ISSUE, AND IT'S GOING  
12 TO HAVE TO BE DECIDED ON A VERY TECHNICAL BASIS.

13 MS. LEWIS: I'M HAPPY TO ADDRESS THAT WHEN WE COME  
14 BACK.

15 MR. SMOLKER: AND ON THE SAME MATTER OF  
16 PRACTICALITY AND TECHNICALITY, I WOULD APPRECIATE IT,  
17 WHATEVER YOUR FINAL DECISION IS, IF YOU WOULD LIFT YOUR  
18 FEBRUARY 22ND ORDER STAYING ALL PROCEEDINGS SO THAT I  
19 MAY MAKE A MOTION TO SET THE CASE FOR TRIAL.

20 THE COURT: WELL, I THINK I NEED A MOTION FOR  
21 THAT. ALL I HAVE IS YOUR SUGGESTION.

22 MR. SMOLKER: I WILL MAKE A MOTION. I THOUGHT IN  
23 PRACTICALITY, YOU WOULDN'T WANT TO --

24 THE COURT: A PARTY IS GOING TO HAVE TO ASK ME TO  
25 DO SOMETHING.

26 MR. SMOLKER: YES.

27 THE COURT: AND IT SHOULDN'T BE IN THE OPPOSITION  
28 TO SOME OTHER MOTION.

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17

1 MR. SMOLKER: ALL RIGHT.

2 THE COURT: NOW, AS YOU KNOW, THE ACTION WAS  
3 STAYED BY THE FILING OF THE BANKRUPTCY OF GRACE  
4 BEFORE -- SOME YEAR BEFORE I STAYED THE ACTION. I  
5 BELIEVE I RECEIVED SOME SORT OF INFORMATION THAT THE  
6 BANKRUPTCY PROCEEDING WAS SO COMPREHENSIVE THAT WE

Hearing - ROUGH JT

7 REALLY COULDN'T PROCEED AS TO ANY PARTIES. BUT I CAN'T  
8 TELL BY LOOKING AT THE COMPUTER RECORD ABOUT THAT.

9 MR. SMOLKER: I GAVE YOU A COPY OF YOUR  
10 FEBRUARY 22ND ORDER.

11 THE COURT: I THINK I GAVE IT BACK TO YOU.

12 MR. SMOLKER: YES. OKAY.

13 THE COURT: ATTACHED TO THE TENTATIVE RULING.

14 MR. SMOLKER: YES, YES.

15 THE COURT: AND I DO REMEMBER THE TRIAL THAT WE  
16 HAD.

17 MR. SMOLKER: YES, AND IT WASN'T EXACTLY THE WAY  
18 SHE DESCRIBED IT. BUT IN ANY EVENT, IT WENT, AND I  
19 THANK YOU VERY MUCH FOR DOING THAT. AND AS LONG AS YOU  
20 REMEMBERED IT, I UNDERSTAND YOU'RE ABOUT TO GO ON  
21 VACATION AGAIN. SOMEBODY OUTSIDE TOLD ME THAT. SO IT  
22 SEEMS LIKE WE KEEP ON COMING BEFORE YOU ON CRITICAL  
23 ISSUE AS VACATION IS ABOUT TO BEGIN.

24 THE COURT: YOU DID COME TO ME BEFORE CHRISTMAS,  
25 15 YEARS APART. I DON'T THINK YOU CAN BLAME ME FOR  
26 TAKING SOME TIME OFF.

27 MR. SMOLKER: I'M NOT BLAMING YOU FOR ANYTHING. I  
28 THINK IT'S AN OMEN. I THINK WHOEVER'S ARRANGING THESE

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18

1 THINGS WANTS YOU TO HAVE TIME TO SETTLE DOWN AFTER  
2 HEARING US.

3 MS. LEWIS: YOUR HONOR, WHAT TIME WOULD YOU LIKE  
4 US TO RETURN?

5 THE COURT: OH, PROBABLY 20 MINUTES.

6 MS. LEWIS: OKAY. PERFECT.

7



Hearing - ROUGH JT

8 (THERE IS A BREAK IN THE  
9 PROCEEDINGS.)

10

11 THE COURT: OKAY. THIS IS TIG INSURANCE COMPANY  
12 VERSUS SMOLKER AGAIN. PLEASE BE SEATED, COUNSEL, IF YOU  
13 WANT TO BE.

14 I THINK THAT DEFENSE COUNSEL WANTED TO MAKE  
15 A POINT. THAT IS MS. LEWIS, OR SHOULD WE PROCEED WITH  
16 MR. SMOLKER?

17 MS. LEWIS: ARE THERE ANY SPECIFIC QUESTIONS YOU'D  
18 LIKE US TO ADDRESS? I THINK I ADDRESSED, RIGHT BEFORE  
19 WE BROKE, MY ISSUE WITH THE REPRESENTATION ON THE  
20 E-MAILS.

21 I GUESS THE OTHER IS I THINK MR. LIU SET  
22 FORTH THE PACER SYSTEM AND HOW IT WORKS ON PACER.

23 DOES THE COURT HAVE ANY QUESTIONS FOR US AT  
24 THIS TIME?

25 THE COURT: THIS MATTER MIGHT GO UP ON APPEAL,  
26 WHICH IS FINE WITH ME. I WOULD THINK THAT IF YOU NEED  
27 TO SUPPLEMENT HOW SERVICE WAS MADE, IT PROBABLY SHOULD  
28 BE DONE.

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19

1 I DON'T REGARD THIS AS A -- THIS IS A  
2 SOMEWHAT DIFFERENT MOTION THAN MANY. SINCE DISMISSAL  
3 FROM THE FIVE-YEAR STATUTE IS MANDATORY ABSENT EXCUSE,  
4 THEN I THINK WE OUGHT TO GET ALL THE INFORMATION WE NEED  
5 TO REACH A MANDATORY DECISION.

6 HOWEVER, MR. SMOLKER HAS A NUMBER OF ISSUES  
7 THAT HE'S GOING TO RAISE, IT APPEARS QUITE EFFECTIVELY,

Hearing - ROUGH JT

8 IN THE SENSE THAT YOU HAVE OVERLAPPING STAYS, FIRST  
9 INITIATED BY THE BANKRUPTCY COURT AS TO GRACE -- W.R.  
10 GRACE, AND THEN INITIATED BY ME, SO THAT -- SO THAT THE  
11 ISSUES WOULD NOT BE SCATTERED, GIVEN THAT W.R. GRACE WAS  
12 A PRINCIPAL AND A TARGET DEFENDANT ON THE  
13 CROSS-COMPLAINT.

14 MS. LEWIS: RIGHT. AND WE THOUGHT DURING OUR  
15 BREAK THAT WE COULD GET THAT RESOLVED FOR THE COURT, BUT  
16 WE COULDN'T PULL UP THE DOCUMENTS WE NEEDED. SO IF THE  
17 COURT WILL ALLOW US A SHORT TIME FOR SOME SUPPLEMENTAL  
18 BRIEFING, IT'S OUR BELIEF THAT WE CAN CLEAR THIS UP, AND  
19 THE COURT WILL BE SATISFIED WITH THE INFORMATION WE WILL  
20 PROVIDE.

21 THE COURT: AND MR. SMOLKER HAS ALSO RAISED THE  
22 ISSUE THAT -- OR HE'S CLAIMED THAT THE BANKRUPT PARTY,  
23 UNDER CHAPTER 11 PARTICULARLY, WHICH IS A  
24 REORGANIZATION, AS OPPOSED TO A LIQUIDATION, IS REQUIRED  
25 TO GIVE NOTICE TO LITIGANTS WHOSE CLAIMS HAVE BEEN  
26 STAYED DUE THE BANKRUPTCY, OF THE LIFTING OF THE STAY.

27 I'M NOT AWARE OF ANY REQUIREMENT, BUT MAYBE  
28 SOMEONE SHOULD LOOK AT IT AND DETERMINE WHETHER THERE IS

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20

1 SUCH A REQUIREMENT.

2 MS. LEWIS: THAT'S FINE, BUT WE CAN ALSO ADVISE  
3 THE COURT THAT MR. SMOLKER WAS GIVEN NOTICE OF THE  
4 LIFTING OF THE STAY. THOSE DOCUMENTS WERE SERVED ON ALL  
5 THE PARTY TO THIS ACTION. SO WE CAN PROVIDE THE COURT  
6 WITH THAT INFORMATION AS WELL.

7 THE COURT: WHO ACTUALLY SERVED THOSE DOCUMENTS?

8 MS. LEWIS: THE BANKRUPTCY COUNSEL. WELL, THE

Hearing - ROUGH JT

9 BANKRUPTCY COURT FILED SOME OF THE DOCUMENTS.  
10 BANKRUPTCY COUNSEL FILED SOME DOCUMENTS. WE DID NOT  
11 FILE THOSE DOCUMENTS. THAT WASN'T WITHIN OUR  
12 INFORMATION. THEY WERE FILED INTO THE PACER SYSTEM.  
13 AGAIN, THE ONES FILED BY THE COURT WERE FILED BY THE  
14 COURT. OTHERS FILED BY THE BANKRUPTCY COUNSEL WERE DONE  
15 SO WITH THE PROPER IDENTIFICATION.

16 THE COURT: SO WHAT YOU'RE TELLING ME IS THAT A  
17 BANKRUPT PARTY IN A CHAPTER 11 IS NOT REQUIRED TO GIVE  
18 NOTICE OF A LIFTING OF A STAY TO LITIGANTS? SINCE THERE  
19 ARE TENS OF THOUSANDS OF BANKRUPTCIES IN A GIVEN YEAR, I  
20 WOULD THINK THAT THAT PROBABLY CAN BE ASCERTAINED BY  
21 REFERENCE TO SOME RULES OR THE ABSENCE OF RULES.

22 MS. LEWIS: YES.

23 THE COURT: OKAY. SO WHAT ELSE SHOULD WE DISCUSS,  
24 MR. SMOLKER?

25 MR. SMOLKER: THERE ARE SEVERAL MORE THINGS. THE  
26 EXHIBIT THAT THEY CALL EXHIBIT A DOESN'T HAVE A PROOF OF  
27 SERVICE ATTACHED TO IT. I HOPE I'VE MADE THAT VERY  
28 CLEAR.

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21

1 AND, ALSO, EXHIBIT A REFERS TO AN EXHIBIT 1  
2 ATTACHED TO EXHIBIT A. SO EXHIBIT A IS NOT EVEN A  
3 COMPLETE COPY OF WHATEVER IT'S SUPPOSED TO BE. SO IF BY  
4 SOME PROCESS, YOU WANT TO THINK ABOUT SERVICE OF  
5 SOMETHING, THIS IS -- YOU CAN TELL FROM THE DOCUMENT  
6 ITSELF THAT THIS IS NOT A COMPLETE DOCUMENT.

7 I WOULD ALSO SAY THAT I'M NOT IGNORING THE  
8 FACT THAT YOU ISSUED A STAY ORDER, AND THAT YOUR STAY

Hearing - ROUGH JT  
9 ORDER HAS NOT BEEN LIFTED.

10 I'M OPERATING ON THE POSITION THAT YOUR  
11 STAY ORDER IS STILL IN EFFECT, THAT THE PROPER PROCEDURE  
12 FOR THEM WOULD HAVE BEEN TO FILE SOMETHING IN THIS COURT  
13 SAYING THE BANKRUPTCY STAY HAS BEEN LIFTED TO A LIMITED  
14 EXTENT BECAUSE IT HAS NOT FULLY BEEN LIFTED, ACCORDING  
15 TO THE DOCUMENT THEY SAID.

16 YOU'LL HAVE TO READ THE DOCUMENT TO SEE HOW  
17 CONFUSED -- AND WHAT THEY'RE ACTUALLY DOING.

18 AND THAT THEY DIDN'T DO THAT THING THAT  
19 THEY'RE REQUIRED TO DO. AND RULE 3.650 VERY CLEARLY  
20 SAYS THAT THE PERSON WHO FILES A NOTICE OF STAY HAS TO  
21 FILE A NOTICE THAT THE STAY HAS BEEN LIFTED.

22 THERE'S ALSO -- AND AS I HAVE MENTIONED,  
23 THERE'S THE ISSUE OF WHAT IS THE EFFECT OF YOUR STAY,  
24 WHICH I'M HONORING, AND THEN THERE'S ALSO THE ALICE  
25 GRAHAM QUESTION.

26 IT'S EASY FOR YOU TO SAY THAT ANY PARTY CAN  
27 FILE A REQUEST FOR DISMISSAL AT ANY TIME. AND ON THE  
28 SURFACE, THAT SOUNDS REASONABLE, BUT WHEN YOU LOOK INTO

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22

1 THE NITTY-GRITTY OF IT, THAT ISN'T THE WAY IT WORKS IN  
2 THIS CASE, BECAUSE MS. LEWIS TOLD US THAT A DEAL WAS  
3 MADE BETWEEN ALICE GRAHAM AND MS. LEWIS, WHICH I WASN'T  
4 A PARTY OF AND HAD NO NOTICE OF, NOR DID I HAVE NOTICE  
5 THAT A DISMISSAL WAS FILED -- THAT A DISMISSAL WAS FILED  
6 FOR A RELEASE OF COSTS OR WAIVER OF COSTS OR SOMETHING  
7 LIKE THAT.

8 WELL, I HAVE AN INTEREST IN WHATEVER KIND  
9 OF DEAL THEY ACTUALLY MADE, AND SO DOES THE BANKRUPTCY

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Hearing - ROUGH JT

10 COURT, AND SO DOES WHOEVER'S IN CHARGE OF THE BANKRUPTCY  
11 AT ALL KINDS OF DIFFERENT LEVELS.

12 THE COURT: HOLD ON JUST A MOMENT.

13 MR. SMOLKER: YES.

14 THE COURT: IS THERE AN AGREEMENT COVERING THE  
15 DISMISSAL OF ALICE GRAHAM?

16 MS. LEWIS: I'M SORRY. THERE WAS A DISMISSAL  
17 FILED, YES.

18 THE COURT: DID YOU HAVE AN AGREEMENT WITH HER?

19 MS. LEWIS: WE DID. THAT WAS TO DISMISS. IT WAS  
20 AFTER THE --

21 THE COURT: SEE, WHAT I'M THINKING IS BOTH  
22 PLAINTIFF -- BOTH CROSS-COMPLAINANTS WOULD BE LIABLE FOR  
23 COSTS.

24 MR. SMOLKER: HEY.

25 THE COURT: IF THE CROSS-DEFENDANTS PREVAILED.  
26 AND I SUPPOSE YOU DON'T HAVE TO PURSUE COSTS, AND MAYBE  
27 YOU WOULDN'T, REGARDLESS OF WHO THE REMAINING  
28 CROSS-COMPLAINANT IS.

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23

1 BUT HOW WOULD YOU APPORTION COSTS BETWEEN  
2 THE TWO DIFFERENT CROSS-COMPLAINANTS?

3 ON THE OTHER HAND, MAYBE YOU DON'T HAVE TO.  
4 YOU'RE ENTITLED TO RECOVER YOUR COSTS FROM EITHER PARTY.  
5 AND THE PARTY THAT PAYS CAN LOOK TO INDEMNIFICATION FROM  
6 THE OTHER PARTY.

7 SO I'VE SORT OF ANSWERED MY OWN QUESTION IN  
8 MY OWN MIND.

9 MS. LEWIS: IT'S NO DIFFERENT THAN YOU HAVE TWO

12/20/2016

Hearing - ROUGH JT

10 ADVERSE PARTY, YOU SETTLE WITH ONE BEFORE TRIAL, YOU GO  
11 TO TRIAL AGAINST THE OTHER, AND YOU SUBMIT YOUR CROSS  
12 BILL AFTER YOU PREVAIL.

13 SO IT'S NO DIFFERENT, BUT I -- YOU KNOW, I  
14 DON'T KNOW WHAT TO TELL THE COURT, OTHER THAN MS. GRAHAM  
15 IS NO LONGER A PARTY TO THIS ACTION. WE NEVER RAISED  
16 HER CLAIMS.

17 THE COURT: I DON'T THINK YOU HAVE TO TELL ME  
18 ANYTHING MORE.

19 MR. SMOLKER: I DO, THOUGH.

20 THE COURT: OKAY.

21 MR. SMOLKER: DOESN'T MATTER IF I'M AN EXPERT IN  
22 THIS OR NOT, BECAUSE ALL THAT MATTERS IS HOW IT REALLY  
23 WORKS.

24 AND THE WAY IT REALLY WORKS IS IF YOU HAVE  
25 A CLAIM AGAINST TWO PEOPLE, AND IT'S JOINTLY AND  
26 SEVERAL, IF YOU RELEASE YOUR CLAIM AGAINST ONE OF THEM,  
27 IT'S A RELEASE AGAINST THE OTHER AUTOMATICALLY. IF YOU  
28 RESEARCH THE LAW, OR AT LEAST I RESEARCHED THE LAW ON

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24

1 THIS, THAT'S WHAT I FOUND. YOU MIGHT HAVE A DIFFERENT  
2 CONCLUSION.

3 SO EXACTLY WHAT THEIR AGREEMENT SAYS IS OF  
4 UTMOST IMPORTANCE IN TERMS OF A POTENTIAL THING GOING  
5 FORWARD. PLUS, IT HAS TO DO WITH THE ENTIRE BANKRUPTCY  
6 AND THE MONEY AND BLAH, BLAH, BLAH.

7 IT SHOULD HAVE BEEN BROUGHT TO THE  
8 BANKRUPTCY COURT FOR PERMISSION TO ENTER INTO IT. I  
9 ALSO SHOULD HAVE GOTTEN NOTICE BECAUSE I HAVE A  
10 FINANCIAL INTEREST IN THE SETTLEMENT AGREEMENT, NOT ONLY

1/20/21

Hearing - ROUGH JT

11 BECAUSE OF WHAT YOU THOUGHT ABOUT HOW WOULD YOU  
12 APPORTION IT, AND THEN YOU SAID THEY HAVE A RIGHT TO GO  
13 AFTER ONE INSTEAD OF EITHER ONE.

14 IT DOESN'T WORK THAT WAY. ONCE YOU MAKE A  
15 SETTLEMENT, DEPENDING UPON WHAT YOUR SETTLEMENT SAYS,  
16 YOU CAN WAIVE YOUR RIGHTS TO GO AGAINST THE OTHER  
17 PERSON.

18 SO ALTHOUGH SHE MIGHT HAVE THE RIGHT TO  
19 DISMISS, THEY DON'T HAVE THE RIGHT TO ENTER IN A SECRET  
20 AGREEMENT IN THE MIDDLE OF A BANKRUPTCY WITHOUT GIVING  
21 ME NOTICE. SO I THINK -- I THINK THE ALICE GRAHAM STORY  
22 IS STILL HERE, BUT THAT RAISES, THEN, THE ISSUE OF WAS  
23 SHE SERVED WITH NOTICE.

24 BUT I GET DOWN TO THE FUNDAMENTAL THING  
25 THAT EVEN IF YOU TAKE EVERYTHING THEY SAY AS TRUE, THIS  
26 ISN'T NOTICE BECAUSE IT REFERS TO AN EXHIBIT 1, WHICH IS  
27 AN INTEGRAL PART OF THIS THING, IN PARAGRAPH NUMBER 3,  
28 AND IT'S NOT ATTACHED. AND THEN PARAGRAPH --

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25

1 THE COURT: I THINK WE'RE GOING TO GET FURTHER  
2 BRIEFING ON THAT.

3 MR. SMOLKER: YEAH.

4 THE COURT: AND GIVEN THAT THE FIVE YEARS HAS  
5 EXPIRED, UNLESS THERE'S AN EXCUSE, I DON'T THINK THERE'S  
6 ANY PREJUDICE TO ANYBODY IF WE GET THESE FACTS RIGHT,  
7 EVEN IF IT REQUIRES SUPPLEMENTAL BRIEFING.

8 MR. SMOLKER: I'M ALL FOR GETTING THE FACTS RIGHT,  
9 NO MATTER WHAT.

10 THE COURT: SO IF WE GET SUPPLEMENTAL BRIEFING,

Hearing - ROUGH JT

11 YOU'LL HAVE A CHANCE TO RESPOND. SHOULD WE WAIT UNTIL  
12 WE GET THAT SUPPLEMENTAL BRIEFING AND YOU RESPOND BEFORE  
13 WE PROCEED, OR DO YOU --

14 MR. SMOLKER: WELL, I'M ASKING YOU ON YOUR OWN  
15 MOTION TO LIFT YOUR STAY OF FEBRUARY 22ND SO WE WON'T  
16 HAVE A CLOUD OVER OUR HEAD OF WHETHER OR NOT, AT LEAST  
17 FROM THIS MOMENT FORWARD, IT'S LIFTED. IT'S MY POSITION  
18 THAT IT HASN'T BEEN LIFTED, AND, THEREFORE, THEY CANNOT  
19 BRING THIS MOTION.

20 THE COURT: I'M SORRY. I'M NOT GOING TO DO THAT.

21 MR. SMOLKER: ALL RIGHT.

22 THE COURT: BECAUSE NO MOTION HAS BEEN MADE TO ME  
23 TO LIFT IT. I DON'T HAVE A SERVICE LIST.

24 MR. SMOLKER: YES.

25 THE COURT: I DON'T KNOW WHOSE --

26 MR. SMOLKER: EXACTLY.

27 THE COURT: I DON'T KNOW --

28 MR. SMOLKER: I'M SORRY.

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26

1 THE COURT: -- WHO'S REMAINING IN THIS ACTION.  
2 I'M NOT GOING TO LIFT SOME STAY, WHICH MIGHT HAVE  
3 CONSEQUENCES TO THE PARTIES, UNLESS I GET A MOTION AND A  
4 SERVICE LIST, AND I CAN MAKE A RULING. IN THIS  
5 PARTICULAR CASE, AS YOU KNOW, THE AUTOMATIC STAY  
6 OCCURRED BEFORE I ISSUED A STAY. MY STAY WAS DERIVATIVE  
7 OF THE AUTOMATIC STAY.

8 NO ONE GAVE ME ANY NOTICE THAT THE  
9 AUTOMATIC STAY HAS BEEN LIFTED UNTIL I GOT THE  
10 APPLICATION FROM GRACE TO DISMISS THE ACTION UNDER THE  
11 FIVE-YEAR STATUTE.

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Hearing - ROUGH JT

12 I NEED TO MAKE A DECISION ON THAT, WHICH I  
13 SHALL DO, BUT I THINK I'D LIKE TO GET FURTHER BRIEFING  
14 ON THE SERVICE ISSUES.

15 MR. SMOLKER: ARE YOU ASKING ME IF I HAVE ANY  
16 OBJECTION TO GETTING FURTHER BRIEFING. I DON'T HAVE ANY  
17 OBJECTION TO YOU GETTING FURTHER BRIEFING, IF THAT'S THE  
18 QUESTION YOU'RE ASKING ME.

19 THE COURT: GOOD. IS THERE ANYTHING MORE THAT WE  
20 NEED TO DISCUSS TODAY?

21 MR. SMOLKER: I -- I THINK IN MY OWN WAY, I'VE  
22 DISCUSSED EVERYTHING I WANT TO DISCUSS, OR I BROUGHT TO  
23 YOUR ATTENTION EVERYTHING I WANTED TO BRING TO YOUR  
24 ATTENTION.

25 THE COURT: OKAY. WE CAN EITHER SET A DATE, WHICH  
26 MIGHT BE A PRUDENT THING TO DO, OR I CAN LET THE -- LET  
27 GRACE SET A DATE BY FILING A BRIEF, GIVING ENOUGH TIME  
28 FOR A RESPONSE, AND SPECIFYING THE DAY OF THE WEEK THAT

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27

1 YOU WANT TO HAVE THE MATTER HEARD.

2 I DON'T HAVE A RESERVATION SYSTEM. I HAVE  
3 TO BE ON THE COURT RESERVATION SYSTEM, BUT I DON'T HAVE  
4 A LIMITATION ON MOTIONS.

5 MR. SMOLKER: I'M GOING TO BE IN SAN FRANCISCO ON  
6 JANUARY 10TH, SO WHATEVER'S HAPPENING, I WOULD LIKE IT  
7 NOT TO BE ON JANUARY 10TH.

8 THE COURT: IT WILL NOT.

9 MR. SMOLKER: AND I'M FLYING BACK JAPAN 11TH.

10 THE COURT: OKAY. IT WON'T BE ON THE 10TH OR  
11 11TH.

Hearing - ROUGH JT  
12 MR. LIU: YOUR HONOR, IF I MAY MAKE A SUGGESTION.  
13 WOULD IT BE PRUDENT TO HAVE SIMULTANEOUS BRIEFING IF WE  
14 CAN SPECIFY THE ISSUE AT HAND?  
15 THE COURT: NO, BECAUSE YOU PROBABLY WON'T FRAME  
16 THE ISSUE THE SAME WAY. I WANT GRACE TO FRAME THE ISSUE  
17 IN A WAY THAT SHOULD BE RESPONDED TO. I GUESS  
18 SIMULTANEOUS BRIEFS, THEY'RE LIKE SHIPS PASSING IN THE  
19 NIGHT.  
20 MS. LEWIS: OKAY. THAT'S TRUE. HOW ABOUT  
21 JANUARY 12TH? IT'S A THURSDAY.  
22 MR. SMOLKER: IS THAT WHEN YOU FILE YOUR BRIEF?  
23 OR WHAT'S HAPPENING ON THE 12TH.  
24 MS. LEWIS: YOU ASKED ME FOR A DATE FOR THE  
25 HEARING.  
26 THE COURT: WHEN ARE YOU GOING TO FILE YOUR BRIEF?  
27 MS. LEWIS: IT WILL BE FILED THE 30TH,  
28 DECEMBER 30TH.

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28

1 THE COURT: DECEMBER 30TH IS FINE. AND  
2 JANUARY 12TH FOR A HEARING?  
3 MR. SMOLKER: I WOULD LIKE TO HAVE 10 DAYS TO  
4 RESPOND.  
5 THE COURT: WELL, IT'S A SUPPLEMENTAL BRIEF. YOU  
6 DON'T NORMALLY HAVE 10 DAYS, BUT I HAVE NO OBJECTION TO  
7 SETTING IT ON THE 19TH, IF THAT'S OKAY WITH YOU GUYS.  
8 MS. LEWIS: YOUR HONOR, I AM IN PARTNERSHIP  
9 MEETINGS FROM AFTERNOON OF THE 18TH --  
10 THE COURT: YOU PICK A DATE.  
11 MS. LEWIS: OKAY. I CAN DO THE 18TH OR THE 23RD.  
12 THE COURT: WHY DON'T WE DO THE 23RD? OKAY.

Hearing - ROUGH JT

13 MR. SMOLKER: LET ME JUST LOOK AT MY CALENDAR TO  
14 MAKE SURE I DON'T HAVE ANY PROBLEMS. I HAVE NO PROBLEM  
15 WITH JANUARY 23RD. IT'S A MONDAY; RIGHT?

16 THE COURT: IT IS.

17 MR. SMOLKER: ARE WE GOING TO BE HERE 8:30?

18 THE COURT: YOU WILL. I'LL BE PICKING A JURY  
19 LATER THAT DAY, SO THAT MEANS I WON'T A LOT OF TIME TO  
20 SPEND ON THIS.

21 MR. SMOLKER: SHOULD WE DO IT ON ANOTHER DAY?

22 MS. LEWIS: THAT'S FINE.

23 THE COURT: WELL, WE COULD, BUT, YOU KNOW, I'M  
24 PRETTY BUSY EVERY DAY.

25 MS. LEWIS: THE 23RD IS FINE WITH US, YOUR HONOR.

26 THE COURT: WE'RE AT THE POINT WHERE WE OUGHT TO  
27 BE ABLE TO MAKE A DECISION ON THIS, RIGHT OR WRONG, SO  
28 THAT EACH SIDE CAN PURSUE THEIR REMEDIES.

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29

1 MS. LEWIS: THANKS, YOUR HONOR.

2 MR. SMOLKER: OKAY. HERE'S WHAT I WROTE DOWN, AND  
3 I WANT TO KNOW IF IT'S RIGHT. GRACE WILL FILE BRIEF ON  
4 DECEMBER 30TH AND SERVE ME ON DECEMBER 30TH SO I WILL  
5 GET THEIR PAPERS ON DECEMBER 30TH.

6 THE COURT: IT'S GOING TO BE BY MAIL, UNLESS YOU  
7 AGREE TO HAVE IT --

8 MR. SMOLKER: OKAY. WELL, IF IT'S BY MAIL, I  
9 WOULD LIKE 15 DAYS TO RESPOND.

10 THE COURT: NO, NO. TEN IS WHAT YOU WANTED.

11 MR. SMOLKER: THAT'S BECAUSE I ASSUMED I WOULD GET  
12 IT ON THE 30TH.

Hearing - ROUGH JT

13 THE COURT: DO YOU HAVE E-MAIL?

14 MR. SMOLKER: I DO.

15 THE COURT: IS IT ON THE TOP OF YOUR PLEADING?

16 MR. SMOLKER: THEY'VE BEEN CORRESPONDING WITH ME

17 BY E-MAIL, AND I'VE BEEN GETTING THEIR E-MAIL.

18 THE COURT: THAT'S TRUE. THEY'LL SEND IT TO YOU

19 BY E-MAIL AND ALSO MAIL.

20 MS. LEWIS: IF MR. SMOLKER WILL STIPULATE TO

21 RECEIVING IT BY E-MAIL, BECAUSE HE'S PREVIOUSLY TOLD US

22 HE WILL NOT ACCEPT --

23 MR. SMOLKER: OH, I'M GOING TO GET IT BOTH WAYS,

24 BECAUSE I'M NOT GOOD AT COMPUTERS. YOU WOULDN'T BELIEVE

25 ALL THE THINGS I MESS UP. I APPRECIATE YOU SENDING IT

26 BY E-MAIL, AND I'LL TRY AND DOWNLOAD IT AND GET FILES

27 AND NOT ERASE IT BY ACCIDENT. YOU CAN FILE IT BOTH

28 WAYS, BY MAIL AND E-MAIL.

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30

1 MS. LEWIS: WOULD FAX BE SUFFICIENT?

2 MR. LIU: WOULD FAX BE SUFFICIENT, YOUR HONOR?

3 THE COURT: FAX WOULD BE FINE.

4 MR. SMOLKER: FAX WOULD BE FINE, AND I'LL MAKE

5 SURE YOU HAVE THE RIGHT NUMBER. AND I WILL RESPOND BY

6 WHEN?

7 THE COURT: I GUESS YOU WILL --

8 MR. SMOLKER: I WILL FILE IT BY THE 10TH?

9 THE COURT: BY THE 10TH; RIGHT.

10 MR. SMOLKER: AND THE HEARING WILL BE ON THE 23RD?

11 THE COURT: THAT'S A LONG WAY AWAY.

12 MS. LEWIS: IT IS.

13 THE COURT: SHALL WE MAKE IT ON THE 16TH?

Hearing - ROUGH JT

14 MS. LEWIS: SURE.

15 THE COURT: IT SORT OF DEPENDS.

16 MR. SMOLKER: THAT'S MARTIN LUTHER KING'S

17 BIRTHDAY. I DON'T THINK THE COURT IS GOING TO BE OPEN.

18 IS THE COURT GOING TO BE OPEN ON MARTIN LUTHER KING'S

19 BIRTHDAY?

20 THE COURT: NO. THEN WE'LL DO IT ON THE 17. AS A

21 MATTER OF FACT, I ONLY HAVE ONE TRIAL ON THE 17TH.

22 MS. LEWIS: YOUR HONOR, WOULD WE HAVE THE

23 OPPORTUNITY TO REPLY?

24 THE COURT: SURE.

25 MS. LEWIS: SO IF WE GET THE REPLY ON THE 10TH,

26 WE'LL REPLY BY THE 13TH, THE FRIDAY?

27 THE COURT: SURE.

28 MS. LEWIS: THANK YOU.

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31

1 MR. SMOLKER: AND SAME THING -- IT WILL BE SERVED

2 BY FAX AND MAIL?

3 THE COURT: THIS WILL DO IT BY FAX; RIGHT?

4 MS. LEWIS: YES, YOUR HONOR.

5 MR. LIU: YES.

6 THE COURT: OKAY. SORRY, FOLKS. SORRY YOU HAD TO

7 WAIT SO LONG.

8 MS. LEWIS: THAT'S NOT A PROBLEM.

9 THE COURT: TODAY'S NOT A TYPICAL DAY, BUT

10 NOTHING'S TYPICAL ANYMORE.

11 MR. SMOLKER: YOUR HONOR, IT STARTED IN 1997.

12 THE COURT: THIS CASE?

13 MR. SMOLKER: YES. THAT'S AN INDIRECT WAY OF

Hearing - ROUGH JT  
14 SAYING IT WASN'T A LONG WAIT.  
15 MS. LEWIS: HAVE A NICE HOLIDAY, YOUR HONOR.  
16 MR. LIU: THANK YOU VERY MUCH, YOUR HONOR.  
17 MR. SMOLKER: THANK YOU.  
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1/23/2021

## PROOF OF SERVICE (Code Civ. Proc., §§ 1013a, 2015.5)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 626 Wilshire Blvd., Suite 975, Los Angeles, California 90017; my email address is bgonzales@bortonpetrini.com; eloaiza@bortonpetrini.com.

On **December 30, 2016**, I served the foregoing document described as **W.R. GRACE & COMPANY'S SUPPLEMENTAL BRIEFING TO MOTION TO DISMISS FOR FAILURE TO BRING ACTION TO TRIAL WITHIN FIVE YEARS AS REQUIRED BY CODE OF CIVIL PROCEDURE §583.310, §583.360; DECLARATION OF JEFFREY Z. LIU AND ROGER HIGGINS; AND [PROPOSED] ORDER THERETO** on the other parties in this action by placing the true copies thereof enclosed in sealed envelopes addressed as indicated in the attached service list.

**BY PERSONAL DELIVERY BY ACE MESSENGER & ATTORNEY SERVICE, INC.:** I caused the aforementioned documents to be picked up from my office at the above referenced business address by an authorized courier or driver authorized by the courier service to receive documents for delivery to the person(s)/office(s) indicated above.

**XX BY MAIL:** As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

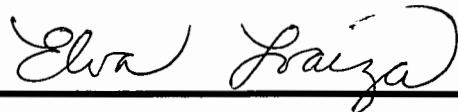
**BY GOLDEN STATE OVERNIGHT COURIER SERVICE:** The aforementioned documents were picked up from my office at the above referenced business address by an authorized courier or driver authorized by the courier service to receive documents, in an envelope or package designated by the courier service with delivery fees provided for addressed to the person(s)/office(s) on whom it is to be served.

**BY FAX:** I caused each document to be delivered by electronic facsimile to the offices listed above. The facsimile machine I used complied with California Rules of Court, Rule 2.003(3) and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2008(e).

**BY EMAIL or ELECTRONIC TRANSMISSION:** I caused the aforementioned documents to be sent to the person or persons at the email address indicated above during normal business hours. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **December 30, 2016**, at Los Angeles, California.

Elva Loaiza



Type or Print Name

Signature

## SERVICE LIST

1		
2	Gary S. Smolker, Esq. LAW OFFICES OF GARY S. SMOLKER 16055 Ventura Boulevard Suite 525 Encino, CA 91436-2609 (VIA U.S. MAIL & EMAIL)	PHONE: (818) 788-7290 FAX: (818) 788-7503 <b>(Gary S. Smolker, In Pro Per)</b>
5	Sara Thorpe, Esq. GORDON & REES 275 Battery Street, Suite 2000 San Francisco, CA 94111	BUS: (415) 986-5900 FAX: (415) 986-8054 <b>(Truck Underwriters Association; Farmers Group, Inc; Farmers Insurance Group of Companies)</b>
8	Michael M. Pollak, Esq. POLLAK, VIDA & FISHER 11150 W Olympic Blvd # 980 Los Angeles, CA 90064	BUS: (310) 551-3400 FAX: (310) 551-1036 <b>(Allstate Insurance Co.)</b>
10	PRINDLE, DECKER & AMARO 310 Golden Shore, 4th Floor P.O. Box 22711 Long Beach, CA 90801-5511	BUS: (562) 436-3946 FAX: (562) 495-0564 <b>(Home Savings Termite Control; Wayne Morris)</b>
13	Jeffrey A. Charleston, Esq. Robert D. Hoffman, Esq. CHARLESTON, REVICH & CHAMBERLIN 1840 Century Park E # 300 Los Angeles, CA 90067	BUS: (310) 551-7000 FAX: (310) 203-9321 <b>(Dennis A. Babbitt; Coregis Group, Inc.; Coregis Insurance Co.; Dean &amp; Associates; California Insurance Company)</b>
16	David L. Hughes, Esq. Stacie Brandt, Esq. BOOTH, MITCHEL & STRANGE LLP 701 South Parker Street Suite 6500 Orange, CA 928868	BUS: (714) 480-8500 FAX: (714) 480-8533 <b>(Reliance Insurance Company)</b>
19	Richard B. Wolf, Esq. LEWIS, D'AMATO, BRISBOIS & BISGAARD 633 West 5th Street Suite 4000 Los Angeles, CA 90071	BUS: (213) 250-1800 FAX: (213) 250-7900 <b>(Inter-Insurance Exchange of Automobile Club)</b>
22	Michael A. K. Dan, Esq. Professional Corporation 11301 W Olympic Blvd Suite 740 Los Angeles, CA 90064	Phone Number: (310) 277-4857 Fax Number: (424) 832-7418

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